IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. .....

THE CONCORD COMPANY, A CORPORATION,
Petitioner (Plaintiff-Appellant),

vs.

WALTER R. WILLCUTS, RUTH WILLCUTS AND CECIL H. DEIGHTON, AS EXECUTORS OF THE WILL AND ESTATE OF L. M. WILLCUTS, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES, *Respondents (Defendants-Appellees).*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REFERENCE TO DECISIONS BELOW

The decision of the Eighth Circuit Court of Appeals, 125 F. (2d) 584, appears at R. 876-886, and the findings and decision of the District Court appear at R. 762-771.

GROUNDS OF JURISDICTION

As stated in the petition at page 6, *supra*, jurisdiction is conferred upon this Court by Sec. 240 (a), Judicial Code, as amended by Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a).

STATEMENT OF CASE

Because the petition at pages 2 to 6, *supra,* outlines a concise statement of the case containing all that is material to the consideration of the questions presented by the within petition for writ of certiorari, further statement is unnecessary.

SPECIFICATION OF ERRORS ASSIGNED AND INTENDED TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that the submission to the jury of the first question, with directory note:

> "Has the plaintiff established by a fair preponderance of the evidence that on March 1, 1913, the fair market value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner?
>
> "Note: If your answer to the above question is 'No' then the following question may be disregarded:"

over petitioner's timely and specific objection and the Trial Court's refusal to submit to the jury only the single question, reading:

> "What was the March 1, 1913, fair market value per share (before the 1500 to 1 split-up) of the Cream of Wheat stock in question?"

was not in violation of Rule 49 (a), Federal Rules of Civil Procedure.

2. In holding that the submission of the first question did not call for a conclusion of law or of mixed law and fact, rather than of an ultimate fact, and was not in violation of Rule 49 (a).

3. In holding that the submission to the jury of the first question, in substance being whether the plaintiff had a right

to recover anything from the defendants, was proper special verdict practice under Rule 49 (a).

4. In holding that the submission of the first question did not refer merely to an evidentiary fact, *i. e.*, the value of the entire 400 shares of stock, and thereby did not violate Rule 49 (a).

5. In holding that the Trial Court's general charge to the jury and the Trial Court's advising the jury as to the effect of their answer to question No. 1 on the outcome of the suit was not violative of the special verdict practice contemplated by Rule 49 (a).

6. In holding that the practice indulged in by the Trial Court was in compliance with the special verdict practice contemplated by Rule 49 (a) in the Federal Courts.

7. In holding that the submission of the first question did not give probative effect and the attribute of evidence and a presumption of correctness to the Commissioner's determination, which had passed out of the case.

8. In holding that the cross examination of plaintiff's witness, F. W. Clifford, on solely collateral and irrelevant matters, inquiring into his personal and family affairs, and not for the purposes of impeachment and to affect his credibility, was not inflammatory and prejudicial.

9. In holding that the opinions of defendants' experts which were based solely on attempted comparisons between the unlisted, closely held stock of Cream of Wheat Company and listed securities of hundreds of other companies, were of sufficient probative value to be admitted in evidence and accordingly to be made the basis of the levying and collecting of taxes.

10. In holding that the companies relied on by defen-

dants' witnesses, as compared with Cream of Wheat Company, were of like character and quality, and similarly situated and affected by the same causes, and in holding that the numerous graphs and charts received in evidence over petitioner's repeated objections were based on comparisons which were not too speculative and which did not result only in prejudicial confusion.

ARGUMENT

I.

The Fundamentally Sound Practice of Submitting a Special Verdict to the Jury, and Thereby Permitting the Development of a Scientific and Sensible Procedure for Jury Trial, Free From the Prejudice, Bias, Sympathy and Partisanship Characteristic of the General Verdict, All as Contemplated by Rule 49 (a) of the Federal Rules of Civil Procedure, Should Be Authoritatively Settled by This Court.

(a)

Special Verdict Practice, Rule 49 (a) of the Federal Rules of Civil Procedure; Fundamental Differences Between Special and General Verdicts.

Rule 49 (a) of the Federal Rules of Civil Procedure reads:

> "Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the

> jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."
>
> *Rule 49 (a), F. R. C. P.*, 28 U. S. C. A., following Sec. 723c.

The decision by this Court will be the first authoritative construction of the fundamentally sound special verdict practice under Rule 49 (a) as contemplated by this Court upon its adoption of Rule 49 (a).

As this Court granted writs of certiorari in the recent cases of *Berry vs. United States* (1941), 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945, "*in order to obtain an authoritative construction*" of one of the rules of civil procedure, and granted certiorari in *Conway vs. O'Brien* (1941), 312 U. S. 492, 61 S. Ct. 634, 85 L. Ed. 969, "to examine whether there had been sufficient compliance" with one of the rules of civil procedure, and in *Reconstruction Finance Corporation vs. Prudence S. A. Group* (1941), 311 U. S. 579, 61 S. Ct. 331, 85 L. Ed. 364, "in view of the importance of the procedural problem," so this Court, in the instant case should grant its writ of certiorari to determine authoritatively in this, *a pioneer case*, the proper special verdict practice, as contemplated by this Court's adoption of Rule 49 (a), Federal Rules of Civil Procedure.

A study of the articles of various leading professors and commentators, a number of whom were members of this Court's Advisory Committee on the new Federal Rules of Civil Procedure, and a study of the comments of the Courts which use the special verdict, and on whose system Rule 49

(a) is founded, make it apparent that the special verdict, as distinguished from the general verdict, *is probably the most satisfactory*, and *is undoubtedly the most scientific method, as free from error as possible, of having controverted fact issues determined by a jury.*

> "We come, then, to this position, that the general verdict is not a necessary feature of litigation in civil actions at law, and that it confers on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the issues, and by shrouding in secrecy and mystery the actual results of its deliberations. Every one of these defects is absent from the special verdict."
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> *Sunderland, "Verdicts, General and Special"* (1920), 29 Yale L. J. 253.

> "In the final analysis, it is believed that the fact-finding procedure of Rule 49 (a) provides the nearest approach to a scientific method of trial by jury yet evolved. * * * In the hands of the Federal judiciary, the modified special verdict of Rule 49 (a) should give new life to the jury system."
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> *Ligscomb, "Special Verdicts Under the Federal Rules,"* 25 Wash. Univ. L. Q. 185, 214.

This Court, in adopting Rule 49 (a) patterned it largely after the Statutes of the State of Wisconsin and the decisions of the Wisconsin Supreme Court thereunder.

The Advisory Committee's note to Rule 49 (a) reads in part:

> "Compare Wis. Stat. (1935), Sections 270.27, 270.28 and 270.30; *Green, 'A New Development in Jury Trial'* (1927), 13 A. B. A. J. 715; *Morgan, 'A Brief History of Special Verdicts and Special Interrogatories'* (1923), 32 Yale L. J. 575."
>
> See *Moore's Federal Practice Under the New Federal Rules*, Vol. 3, p. 3096, 28 U. S. C. A., Rule 49, following Sec. 723c.

The best summary of the proper special verdict practice as it should be under Rule 49 (a) is, in fact, a summary of the Wisconsin practice, and is found in a paper prepared by Hon. Gunnar H. Nordbye, the Trial Judge in the within case, in March of 1941, *subsequent to his decision of the within case*, and is entitled, "*Use of Special Verdicts Under Rules of Civil Procedure*," 2 F. R. D. 138:

> "On the other hand, the special verdict submits to the jury either a verdict in the form of special written findings upon each issue of fact, or written questions as to the issues of fact susceptible of categorical or other brief answers. Under the special verdict practice, the Court would not discuss the law except as it might be necessary to explain or amplify the question submitted, nor would he inform the jury as to the effect of their answers on the ultimate disposition which would be made of the case. Under this practice, the jury would make findings of the ultimate facts, not evidentiary facts or immaterial issues, and the Court would apply the law to such facts and enter judgment accordingly. In theory, at least, the jury are called upon to perform the duties of arbiters of fact, free from the prejudice, bias and sympathy, which often result when they are taking ballots on whether the verdict should be in favor of the plaintiff or the defendant. As illustrative of the purpose to emphasize the facts in submitting a special verdict, rather than the parties, the Court is not required to instruct the jury as to which party has the burden of proof. They are simply asked to determine whether, by the greater weight of the evidence, it appears that certain facts are true. That is, it is recognized that the better practice is to point out where the burden lies, not upon whom. It is quite apparent, therefore, that the whole thought behind the special verdict is to free the jury from any procedure which would inject the feeling of partisanship in their minds, and limit the deliberations to the specific fact questions submitted."
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> *Hon. Gunnar H. Nordbye, "Use of Special Verdicts Under Rules of Civil Procedure,"* 2 F. R. D. 138, 139.

(b)

The Submission of the First Question Was Error Because It Called for a Conclusion of Law or of Mixed Law and Fact, Rather Than of an Ultimate Fact, All in Violation of Special Verdict Practice Under Rule 49 (a).

The decision of the Circuit Court of Appeals fails to perceive that the submission of the first question, reading,

> "Has the plaintiff established by a fair preponderance of the evidence that on March 1, 1913, the fair market value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner?"

was, in fact, a submission of a conclusion of law—a submission in effect of a general verdict, *i. e.*, whether the taxpayer was entitled to recover anything from the defendants—all contrary to the universally established special verdict practice.

Without discussion the Circuit Court's only comment on this vital issue is:

> "A third contention that submission of the question constituted reversible error because the court thereby submitted the general issue of the plaintiff's right to recover anything appears to be equally without support in any citation given us" (R. 885-886).
>
> 125 F. (2d) 589.

That the first question is, in fact, the submission of a conclusion of law, and, accordingly, contrary to established special verdict practice, and contrary to the decisions of the Courts of the states using special verdicts, and *in conflict* with the decision of the Circuit Court of Appeals of the Sixth Circuit is apparent from the following authorities:

> "Conclusions of law must not be submitted. To do so would permit the jury to do just what the general verdict allows, namely: dodge or hide the decision of

the actual fact issues. This practice would leave the factual basis of the decision as much in doubt as does a general verdict."

Hyde, "Fact Finding by Special Verdict," 24 Journal of American Judicature Society 144, 148 (Feb., 1941).

"The reason is quite plain. The statute contemplates the right of the party to a separate finding of the jury upon each such specific question of fact. It is the duty of the Court to administer the statute so that the result aimed at be attained. If the Court may refuse to submit such specific questions and simply submit the general question of negligence, then the statute is practically eliminated from the statute book, and in every negligence case two or three general questions covering simply ultimate conclusions of fact and law, and amounting to but little more than a general verdict, will take the place of the findings of specific fact contemplated by the statute."

Rowley vs. C., M. & St. P. Ry. Co. (1908), 135 Wis. 208, 217, 115 N. W. 865.

"The law is that interrogatories must put only questions of fact from which a legal proposition may be deduced.

* * * * * * * * *

"Interrogatory No. 1 did not ask the jury to find whether there was a defect in the crane but required it to ascertain whether the defect could have been discovered by the exercise of ordinary or reasonable care which was a question of law. The same imperfection is found in the others.

"If not questions of law singly, they are mixed questions of law and fact which are improper in interrogatories. *Runyan vs. Kanawha Water & Light Co.*, 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430; *Banner Tobacco Co. vs. Luman Jenison, et al.*, 48 Mich. 459, 12 N. W. 655; *Toledo & W. R. Co. vs. Goddard*, 25 Ind. 185; *Louisville N. A. & C. R. Co. vs. Worley*, 107 Ind. 320, 7 N. E. 215."

Carpenter vs. B. & O. R. R. Co. (6 C. C. A., 1940), 109 F. (2d) 375, 379.

Petitioner's position is that the first question called for a conclusion of law or a conclusion of mixed fact and law.

The submission of the first question was the submission of a conclusion of law because it permitted the jury "to do just what the general verdict allows, namely: dodge or hide the decision of the actual fact issues." (24 Journal of Am. Jud. Soc. 144, 148.)

The practice under the submission of the first question leaves "the factual basis of the decision as much in doubt as does a general verdict" (24 Journal of Am. Jud. Soc. 144, 148), and amounts "to but little more than a general verdict" (135 Wis. 208, 217), which takes "the place of the findings of specific fact contemplated by" (135 Wis. 208, 217), Rule 49 (a).

It, accordingly, appears that the writ of certiorari should be granted in the within case, not only to obtain an authoritative construction of Rule 49 (a), but to resolve the conflict between the decisions of the Circuit Court of Appeals for the Sixth Circuit and the Circuit Court of Appeals for the Eighth Circuit.

(c)

The Submission of the First Question Was Error Because It Referred Merely to an Evidentiary Fact, i. e., the Entire 400 Shares of Cream of Wheat Stock Rather Than Those Involved in the Within Proceeding.

The fair market value of the 400 shares or of the entire issued and outstanding stock of the Cream of Wheat Company was not being litigated in this case. The entire company was not for sale. All of the capital stock was not for sale. We were seeking only to determine the fair market value of approximately 8-1/3 shares out of the 400, the value of approximately 2% of the entire stock, not even enough to control the company.

We were seeking to determine the fair market value of stock in retail lots, not in wholesale lots—the price arrived at between a willing seller and a willing buyer of 8-1/3 shares of stock—not of 400 shares.

It has been uniformly held, until the decision of the Eighth Circuit Court of Appeals in the within case, that the submission of a special verdict question which relates only to evidentiary facts rather than ultimate facts is substantial and reversible error. *Monticello Bank vs. Bostwick* (8 C. C. A., 1896), 77 Fed. 123, 126; *Lipscomb, "Special Verdicts Under the Federal Rules,"* 25 Wash. Univ. L. Q. 185, 193; *Sunderland, "Verdicts, General and Special,"* 29 Yale Law Journal 253; *Nordbye, "Use of Special Verdicts Under Rules of Civil Procedure,"* 2 F. R. D. 138, 142.

(d)

Proper Special Verdict Practice Forbids the Court to Advise the Jury in Its Charge as to the Effect of Their Answer to a Question on the Outcome of the Suit.

The submission of question No. 1 gave rise to the Trial Court's error in making a general charge to the jury, and in advising the jury that if they answered the first question "No," then that would end the case, and there would be no necessity of determining the somewhat complicated question of what was the March 1, 1913, fair market value of Cream of Wheat stock in question, on which they had been listening to evidence for two weeks.

The Wisconsin statutory scheme and the decisions of the Supreme Court of the State of Wisconsin on special verdict practice are the bases of Rule 49 (a). See *Green, "A New Development in Jury Trial,"* 13 A. B. A. J. 715; *Ilsen & Hone, "Federal Appellate Practice as Affected by the New Rules of Civil Procedure,"* 24 Minn. Law Rev. 1, 7; *Ad-*

visory Committee's Note to Rule 49 (a), 28 U. S. C. A., following Sec. 723c.

The special verdict practice, stripped of its common law refinements, has had its longest and most consistent development in Wisconsin, and has been incorporated in Rule 49 (a).

As appears from paragraph 9 of the findings of fact of the Trial Court (R. 770), it was agreed between the parties that a special verdict be submitted to the jury in accordance with Rule 49 (a). This, of course, means that the special verdict practice, as developed in the State of Wisconsin and as obviously adopted by this Court in Rule 49 (a), must be followed.

It has been consistently held, not only in Wisconsin, but in the other states using special verdict practice to any extent, that:

> "'It is reversible error for the trial court by instruction to the jury to inform the jury expressly or by necessary implication of the effect of an answer or answers to a question or questions of the special verdict upon the ultimate right of either party litigant to recover or upon the ultimate liability of either party litigant.' *Banderob vs. Wisconsin Cent. R. Co.*, 133 Wis. 249, 287, 113 N. W. 738; *Beach vs. Gehl*, 204 Wis. 367, 371, 235 N. W. 778; *Anderson vs. Seelow*, 224 Wis. 230, 233, 271 N. W. 844.
>
> "There is an abundance of authority to the proposition that it is reversible error for either the court or counsel to inform the jury of the effect of their answer or answers upon the ultimate result of their verdict. If single instances of prejudicial statements and arguments be held reversible error, repeated instances multiply the gravity of the error."
>
> *Pecor vs. Home Indemnity Co. of N. Y.* (1940), 234 Wis. 407, 419, 291 N. W. 313.

The following authorities also specifically so hold: *Meyer vs. Home Ins. Co.*, 127 Wis. 293, 106 N. W. 1087; *Beach vs.*

Gehl, 204 Wis. 367, 235 N. W. 778; *Anderson vs. Seelow*, 224 Wis. 230, 271 N. W. 844; *Humble Oil & Refining Co. vs. McLean* (1926), 280 S. W. 557; *Cannon Ball Motor Freight Lines vs. Grasso* (1933), 59 S. W. (2d) 337; *Green*, "*A New Development in Jury Trial*," 13 A. B. A. J. 715; *Lipscomb*, "*Special Verdicts Under the Federal Rules*," 25 Wash. Univ. L. Q. 185, 202, 206; *Hyde*, "*Fact Finding by Special Verdict*," 24 Journal of American Judicature Society 144, 148 (Feb., 1941).

The Trial Court, in connection with the submission of the first question, charged the jury:

> "That is your first question. Now you will answer that question either 'Yes' or 'No,' and you will find a place in the verdict which states, or wherein you will either answer that 'Yes' or 'No.' If you answer it 'No,' then that will end the case, and you need not spend any time in determining the exact value of the Cream of Wheat stock, because if the plaintiff has not sustained the burden of proof, that the Commissioner erred, then that ends the case.
>
> * * * * * * * * *
>
> "Now, I wonder if I have made that clear. If you answer this first question 'No'—and you will observe that we have written here a note which says,
>
> "'If your answer to the above question is "No" then the following question may be disregarded,'
>
> you would not pay any attention to the next question. You would have that verdict then signed by your foreman, dated, and returned to the Court" (R. 756-757).

Directly contrary to his charge to the jury, the Trial Court subsequently, and in his paper entitled, "Use of Special Verdicts Under Rules of Civil Procedure," stated on this identical point:

> "Under the special verdict practice, the Court would not discuss the law except as it might be necessary to explain or amplify the question submitted, *nor would he inform the jury as to the effect of their answers on the*

> *ultimate disposition which would be made of the case.* * * * In theory, at least the jury are called upon to perform the duties of arbiters of fact, free from the prejudice, bias, and sympathy which often result when they are taking ballots on whether the verdict should be in favor of the plaintiff or the defendant. * * * It is quite apparent, therefore, that the whole thought behind the special verdict is to free the jury from any procedure which would inject the feeling of partisanship in their minds * * *." (Italics ours.)
>
> 2 F. R. D. 138, 139.

The Trial Court thereby admitted error. The charge not only violated the established special verdict practice, but under the circumstances invited the jury to take the easy way out by answering the first question "No"—an invitation for the jury to exercise the simple act of writing the word "No" in order to end the case—a summary determination without a full consideration of the merits—an invitation accepted promptly.

The Trial Court's charge to the jury shows beyond doubt the confusion in its mind between proper special verdict practice under Rule 49 (a) and general verdict practice.

The Circuit Court of Appeal's only comment on this vital and hitherto undetermined issue is, "the objections that it let the jury know what effect their answer would have * * * have been considered" (R. 885). (125 F. (2d) 584, 589.)

Such a summary disposition of this issue clearly warrants the granting of the writ of certiorari because the lower court, by confession, so far departed from the accepted and usual course of judicial procedure, and the Circuit Court of Appeals so far sanctioned such departure, as to call for an exercise of this Court's power of supervision.

II.

The Submission of the First Question Was Error Because It Gave Probative Effect and the Attribute of Evidence and a Presumption of Correctness to the Commissioner's Determination of Value, Which Had Passed Out of the Case.

The first question was worded:

> "Has the plaintiff established by a fair preponderance of the evidence that on March 1, 1913, the fair market value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner?"

The figure of value determined by the Commissioner was no evidence of value. It was not in the case as evidence of value. His decision as to value was hearsay, had no weight whatsoever, and could not even be considered, either as evidence of value or otherwise, in view of the fact that the taxpayer had introduced evidence showing that the Commissioner's determination was wrong.

That which no longer existed was given weight as evidence and as having probative effect—something picked out and set up by the Trial Court as a criterion of value which had to be overcome by a fair preponderance of the evidence.

The "*prima facie* correctness rule" of the Commissioner's determination is merely a procedural presumption, one which in this case should not be permitted to hinder, embarrass or influence in any respect whatsoever the jury's job of determining the fair market value of the stock in question.

The Circuit Court of Appeals summarily disposed of this matter with the following two sentences:

> "It is argued for the appellant here that something about the first question put to the jury conveyed to them some implication that the Commissioner's determination of value was presumptively correct. But there were *no words* in the question expressive of such an idea and

the instructions of the court made it perfectly clear to the jury that there was no such presumption to be indulged by them and that the jury was required to make its finding upon the whole body of testimony before it." (Italics ours.) (R. 880.)

125 F. (2d) 586.

This summary and unsatisfactory disposition of this question adds nothing to the word "affirmed" at the end of the opinion.

Since when have "words" rather than substance controlled the disposition of any case in this Court?

The first question more effectively brought into the case the Commissioner's determination and a presumption of its correctness than any mere statement by the Court to the jury that the Commissioner's determination is presumed to be correct. The hurdle set up by the submission of the first question would be much more difficult to overcome than any hurdle set up in any words "expressive of such an idea" "that the Commissioner's determination of value was presumptively correct."

The Court by its summary disposition of this matter and contrary to the established rules refuses to recognize that upon the disappearance of the presumption only one issue remained. That issue was the fair market value of the stock involved and must be decided on all the probative evidence adduced, unhindered, unembarrassed, and uninfluenced in any respect by the Commissioner's determination.

It was the Trial Court's and the jury's function:

> "* * * to try the question of" the fair market value of the stock in question "in this case *de novo*, without in any way being limited to the evidence heard by the Commissioner, and *unprejudiced by any action he* may have taken in the matter." (Italics ours.)
>
> *Fidelity & Columbia Trust Co. vs. Lucas* (1925), 7 F. (2d) 146, 151, cited with approval in *Wickwire vs. Reinecke*, 275 U. S. 101, 105, 48 S. Ct. 43, 72 L. Ed. 184.

Additional authorities with which the decision of the Circuit Court of Appeals is in direct conflict are:

Redfield vs. Eaton (D. C., Conn., 1931), 53 F. (2d) 693, 696.

Wiget vs. Becker (8 C. C. A., 1936), 84 F. (2d) 706, 707-708.

St. Louis Union Trust Co. vs. Becker (8 C. C. A., 1935), 76 F. (2d) 851, 863.

Willcuts vs. Stoltze (8 C. C. A., 1934), 73 F. (2d) 868, 872-873.

Flannery vs. Willcuts (8 C. C. A., 1928), 25 F. (2d) 951, 953.

Gamble vs. Commissioner (6 C. C. A., 1939), 101 F. (2d) 565, 567-8.

Manchester Board & Paper Co. vs. Commissioner (4 C. C. A., 1937), 89 F. (2d) 315, 317.

U. S. ex rel. Scharlon vs. Pulver (2 C. C. A., 1931), 54 F. (2d) 261.

Mobile, Jackson & Kansas City Railroad Co. vs. Turnipseed (1910), 219 U. S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78.

III.

Prejudicial Cross Examination of F. W. Clifford.

The prejudicial cross examination and plaintiff's counsel's objections thereto appear at length at pages 523 to 529 of the Record, and has in it such questions as the following:

"And is it a fact that you and your wife acquired all of the capital stock of the Chelsea Corporation in exchange for Cream of Wheat Company stock?" (R. 523).

"Well, you got all of the stock, and then you, as I recall it, had two-thirds of the stock issued in the names of your associates, who happened to be your children—is that right?" (R. 524).

"And you receipted for the shares of stock for the children, as trustee?" (R. 525).

"Well, as a matter of fact, the certificates of stock were left right in the stock book, weren't they?" (R. 525).

"Well, you do remember that thereafter you always personally controlled all of the funds of the Chelsea Corporation?" (R. 525).

"Well, you ran the whole show, didn't you?" (R. 525).

"So all of the funds of the Chelsea Corporation went through your personal bank account?" (R. 526).

"And out of that bank account was paid all of your living expenses?" (R. 526).

"In other words, the Chelsea Corporation was not strong enough—" (R. 526).

"But the actual money would be in your personal bank account?" (R. 527).

"Do you mean to say there was not charged against this account, household expenses, including repairs to automobiles, wages of chauffeurs and items of that kind?" (R. 528).

Such examination was of no relevancy whatsoever. In no way could it aid in the determination of any issue in the case. It could not affect the witness' credibility, and could not be made the basis for any impeachment.

It could not be used as a foundation for getting into evidence certain capital stock tax returns which, on their face, were inadmissible. *Wiget vs. Becker* (8 C. C. A., 1936), 84 F. (2d) 706.

This cross examination could do nothing except prejudice, inflame, arouse and incite the jury against the witness and against the taxpayer, and create the erroneous and unfounded impression that the witness and the taxpayer were using family corporations in an attempt to evade taxes.

The sanction by the Circuit Court of Appeals of this highly improper procedure requires the exercise of this Court's power of supervision.

IV.

The Opinions of Defendants' Experts and the Graphs and Charts Received in Evidence in Connection Therewith, and Over Petitioner's Objections, Were Not of Sufficient Probative Value and Were Too Speculative, Resulting Only in Prejudicial Confusion.

As noted above in the Statement of Case, the basic method followed by all of defendants' witnesses in determining their opinion of the fair market value of the Cream of Wheat stock was to attempt to compare Cream of Wheat Company, whose stock was closely held, with other companies whose stock was listed on the stock exchanges or sold over the counter extensively on or about March 1, 1913.

Defendants' witnesses were unable to express an opinion as to the fair market value of Cream of Wheat stock unless they could compare it with some stock whose price was quoted:

> "Q. In order to apply your basic rule, you have to have a stock market quotation price?
>
> A. Well, yes, some price quotation. It might not be on the stock exchange. It might be from some other source, but it is necessary to have a price quotation.
>
> Q. So that is one of the factors—you must have that price and then work from that?
>
> A. That is correct" (R. 497).

Opinions based on comparisons between unlisted closely held stock and listed securities of competitors or of other companies are too speculative to be made the basis of the levying and collecting of taxes.

The decisions recognized in the tax world as leading authorities in determining the fair market value of an unlisted closely held stock, are *Estate of Jacob Fish* (1925), 1 B. T. A. 882; *Geo. D. Harter Bank, Executor* (1938), 38 B.

T. A. 387, and *James Couzens* (1928), 11 B. T. A. 1040, 1163, 1172.

Without citation of these leading cases, and without even a mere reference to them, the Circuit Court of Appeals overrules them. That those decisions have been recognized as law and as determining the administrative action of the taxing authorities is apparent from the fact that the *Couzens* case was referred to by this Court as recently as December 8, 1941, in *United States vs. Kales*, 62 S. Ct. 214, 86 L. Ed. 192.

The Circuit Court of Appeals, in sustaining the admissibility of defendants' charts and opinions and comparisons and conclusions drawn by defendants' witnesses, ignores the controlling rule established by this Court to the effect that the properties compared must be:

> "* * * of like character and quality, similarly situated and affected by the same causes" and "to the extent that any of the witnesses based their opinions upon a knowledge of" sales of property which do not meet these requirements "their evidence should be disregarded."
>
> *Kerr vs. South Park Commissioners* (1886), 117 U. S. 379, 386, 6 S. Ct. 801, 29 L. Ed. 924.

In so doing, the Circuit Court of Appeals has decided an important question of Federal tax law in conflict with the decisions of this Court.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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